United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL **76-7493**

To be argued by
THOMAS R. NEWMAN

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

MAX HABER, as executor of the Goods, Chattels and Credits that were of GEORGE HABER, Deceased, and MAX HABER, individually,

Plaintiff-Appellant,

against

THE COUNTY OF NASSAU and ROBERT SEHLMEYER,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF OF DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

Cases Cited

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BRIEF OF DEFENDANTS-APPELLEES

Preliminary Statement

This action is in Federal Court by reason of plaintiff's claim against the County of Nassau and one of its police officers for alleged violation of the civil rights of plaintiff's son, George Haber, who was accidentally shot and killed while resisting arrest during the course of a violent struggle with the defendant Sgt. Robert Sehlmeyer for possession and control of the officer's gun.

At the time of the incident, Haber was under the influence of a heavy dose of a combination of hallucinogenic and psychotogenic drugs (LSD and marijuana) which ren-

dered him completely unable to perceive reality and accounted for his bizarre behavior. Plaintiff's second and third claims are state law claims based on defendants' alleged negligence and seek damages for wrongful death and conscious pain and suffering.

At the close of plaintiff's case, and again at the close of all the evidence, defendants moved to dismiss on the grounds that (i) there was no evidence of negligence on the part of the defendants, and (ii) decedent was guilty of contributory negligence as a matter of law (5a, 985).*

The court reserved decision on defendants' motion made at the end of the case and submitted the issues on the following three claims in plaintiff's complaint, as amended, to the jury:

> 1. An alleged violation of plaintiff's son, George Haber's, civil rights by the defendant Sehlmeyer (on which the jury returned a verdict for said defendant).
>
> 2. Wrongful death of George Haber based on the alleged negligence of the defendants (on which the jury returned a verdict for the plaintiff for $100,000).
>
> 3. Conscious pain and suffering of George Haber based on said negligence (on which the jury returned a verdict for the plaintiff for $25,000).

Following the verdict, defendants moved pursuant to Rule 50(b) and (c) of the Federal Rules of Civil Procedure for judgment n.o.v. and, in the alternative, for a new trial pursuant to Rule 59, Fed. R. Civ. Pro. By decision (985-92) dated September 8, 1976, Judge Platt

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* References in parentheses refer to pages of the joint appendix.

granted defendants' motions and on September 10, 1976, a judgment (993) was entered in the United States District Court for the Eastern District of New York dismissing the complaint. In his decision (reported at 418 F. Supp. 1120), Judge Platt noted that he was granting defendants' request for a new trial as alternative relief so that if the judgment n.o.v. is vacated or reversed, a new trial should be had (987). Plaintiff has appealed from the judgment of dismissal (994).

As to the County of Nassau, the court had granted a pretrial motion to dismiss plaintiff's first claim but denied it as to the second and third claims under the doctrine of pendent jurisdiction (441 F. Supp. 93). Subsequent to the trial and verdict, however, the decision of the Supreme Court of the United States in *Aldinger* v. *Howard,* —— U.S. ——, 49 L.Ed. 2d 276 (June 24, 1976) made clear that plaintiff's second and third state law claims are "without the statutory jurisdiction of the district court" (Id. at p. 288). On the basis of the *Aldinger* decision, Judge Platt set aside the verdict against the County of Nassau and dismissed the claim against it.

Questions Presented

1. Whether Officer Sehlmeyer's conduct in the performance of his police duties in attempting to subdue a violent drug-crazed arrestee who fought the officer for control of his service revolver and posed a real threat to the officer's life may be found to constitute actionable negligence?

   We submit that as a matter of law it may not.

2. Whether the court below correctly held under the applicable New York law that plaintiff's decedent was contributorily negligent as a matter of law?

   We submit that it did.

3. Whether plaintiff has offered any rational theory based on the evidence which can support his contention that defendant Sehlmeyer was negligent?

   We submit that he did not.

4. Whether the court below properly exercised its discretion in granting defendants' motion for a new trial as alternative relief?

   We submit that it did.

5. Whether the award was not grossly excessive?

   We submit that it was.

The last two questions need not be reached if this Court agrees that the court below properly granted defendants' motion for judgment n.o.v. dismissing the complaint.

Counter-Statement of the Facts

Preliminary

Plaintiff has taken a few generalizations as to how this Court views evidence when passing on the propriety of a grant of judgment n.o.v. and dismissal of the complaint as license to ignore virtually all the relevant proof adduced during two weeks of trial (4a-5a) and contained in the lengthy two-volume joint appendix.

Plaintiff's presentation of "The Relevant Facts" is so misleading by reason of what has been omitted therefrom, that we are compelled to present this counter-statement of the facts.

Before turning to the proof, however, it should be noted that plaintiff seeks reinstatement of the verdict. Accordingly, if this Court should find the dismissal to have been unwarranted, it will be necessary for it to pass on Judge Platt's granting of defendants' motion for a new trial as alternative relief "even if this [the District] Court's judgment notwithstanding the verdict against the defendant Sehlmeyer is not sustained" (987).

In this connection, it is basic that on a motion for a new trial the trial court is free to make its own analysis and appraisal of the evidence and need *not* adopt that view of the evidence most favorable to the plaintiff.

Plaintiff's brief, in purporting to state the applicable law with respect to the trial court's power to review the evidence on defendants' post-verdict motions, makes no distinction between the motion for judgment n.o.v. pursuant to Rule 50(b) and defendants' alternative motion for a new trial under Rule 59. Plaintiff's quotations (Pltf's brief, pp. 2, 15, 17-19), are plainly not applicable to the motion for a new trial.

The power of the court to review the evidence when considering a motion for a new trial is far broader than on a motion for judgment n.o.v. The applicable rules are sum-

marized in 11 Wright & Miller, *Federal Practice & Procedure*, §2806, pp. 43-45, as follows:

> "Thus on a motion for a new trial—unlike a motion for a directed verdict or for judgment notwithstanding the verdict—the judge may set aside the verdict even though there is substantial evidence to support it. He is not required to take that view of the evidence most favorable to the verdict-winner. . . . But on a motion for a new trial on the ground that the verdict is against the weight of the evidence, the judge is free to weigh the evidence for himself. Indeed it has been said that the granting of a new trial on the ground that the verdict is against the weight of the evidence 'involves an element of discretion which goes further than the mere sufficiency of the evidence. It embraces all the reasons which inhere in the integrity of the jury system itself.'"

See also, 6A Moore, Federal Practice, ¶59.08(5).

In *Simpson* v. *Skelly Oil Co.*, 371 F.2d 563, 570 (8th Cir. 1967), the Court set forth the governing standard as follows:

> "In ruling on a motion for a new trial, the trial court should exercise its independent judgment after a weighing of all the evidence and any other pertinent factors in determining whether the verdict was against the clear weight of the evidence or would result in a miscarriage of justice. Thus, the case should be examined, not in the light most favorable to the plaintiff, but according to the analysis and appraisal by the trial court of the weight of all of the evidence considering also any other relevant factors. Williams v. Nichols, 266 F.2d 389, 393 (4th Cir. 1959)."

The foregoing comments, of course, are not meant to detract in any way from defendants' primary contention

that judgment n.o.v. dismissing the complaint was properly granted and should be affirmed.

The uncontroverted facts

Around 11:00 p.m. on September 29, 1972 in the parking lot of the Nassau Coliseum, where a rock concert had been in progress, plaintiff's decedent, George Haber, molested two girls, seizing one by the arm while he "attempted to pull her between some of the parked cars" (509, 712) and another by her buttocks (698, 706-08). The girls fled from Haber, warned another girl about him (725), and complained to the defendant Robert Sehlmeyer, a uniformed police sergeant in a radio patrol car on duty in the Coliseum's parking lot (25-6, 33, 52-3, 338-39, 509), that Haber had "molested" them (698-99, 700, 712).

Haber had been noticed earlier as he repeatedly tried to push his way into the concert without a ticket past the guards at the door who finally threw him out (89, 723-24). Those who saw Haber all testified that he appeared "irrational," "like he had done some sort of drug," "violent" and "wild" (Nelson, 98; Loeffler, 592; Kragan, 705-06; Moore, 732). In the words of one bystander. "He wasn't a normal person" (Moore, 725). In the words of another bystander, "the kid was acting berserk" (Keller, 804).

There was indisputable proof that Haber had been on heavy doses of both LSD and marijuana that evening (214-15, 232-33, 235, 672-75, 692) and he appeared to those who saw him to be under the influence of drugs (98, 592, 598, 706, 724, 804).

Expert medical testimony introduced by the defense, and standing uncontradicted, was that from the quantity of LSD [200 nanograms (215, 233)] found by the toxicologist on autopsy in Haber's blood (232)* and the evidence that

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* Based on the total blood volume in the body, Dr. Araki testified that Haber probably had 30 to 35 times the 200 nanograms of LSD in his body, a large amount for this drug (233)

he had also smoked at least seven marijuana cigarettes (235, 674, 692), it was certain that at the time of the incident he was hallucinating and unable to perceive reality (867, 871-72).

Dr. Robert Newman, an expert in the field of drug abuse (852-54), testified that "LSD is the most potent, the strongest psychotogenic drug" (857), and he explained that LSD and marijuana in combination have an intensifying effect on each other, so as to multiply rather than merely add to the effect of the other drug; this is known as "potentiating" (857-58).

Catherine Kragan, the 15-year-old girl Haber had "grabbed . . . on the ass" (698), testified that she and her girlfriend described Haber to Sergeant Sehlmeyer and told him where Haber was located (509-10, 699-700). Sergeant Sehlmeyer went to investigate the girls' complaint, having reasonable grounds to believe a crime had been committed (512-13). He drove through the lot to the aisle where Haber was, stopped his patrol car a short distance behind the suspect, identified himself as a police officer and ordered Haber, who was walking away from him, to stop (63-5, 372-73).

Haber failed to stop. The officer called to him a second time, again identifying himself as a policeman, and Haber still failed to stop (66-8). The officer then got out of the car leaving the engine running in "park," caught up with Haber (67-9, 378-79), detained him and started to walk him back to the squad car, his hand on the boy's right arm (69, 514).

Suddenly Haber, who was 5' 9" tall and weighed about 160 pounds (399), spun around, slipped out of the officer's grip, "became very violent and started screaming, started ranting and raving" (399, 514). The violence of Haber's assault upon the officer caused Sehlmeyer to fall to the ground with Haber coming down on top of the officer

(514).* A violent struggle ensued during which the officer sought to defend himself by hitting Haber with his blackjack (403, 514). Haber seemed not even to feel the blow and ripped the blackjack out of the officer's grasp (404, 514). Both men were on the ground wrestling and fighting and Haber ended up kneeling on the ground behind the officer with his arms around the officer's chest (404, 406, 514-15).

During his struggle with Haber the officer requested help from a woman, Christina Moore, (then Di Greggorio) in a nearby car, and at his request she went to his squad car and radioed for assistance (407-08, 515-16, 729-30). Mrs. Moore testified that the officer "looked scared" (729) and "he seemed like he was trying to keep everything very calm" (410, 729), he "was trying to be very calm, very relaxed" (731). Every time the officer moved, however, it seemed to set Haber off again (410). He would tense up and "tighten his grip" (410).

There came a time when the officer managed to get to his feet and Haber became "docile" (412-14, 421). Sergeant Sehlmeyer then swung around and put a hammer lock on Haber (420-22) and started walking him back toward the police car; Haber offered no resistance (424-25). The officer "intended to handcuff him when we got to the vehicle" (426).

When they approached the car Haber suddenly spun around and "broke loose" (82, 427), knocking the officer off balance (432-33). The officer tried unsuccessfully to regain physical control of Haber "to prevent him from escaping from me" (433). Haber jumped into the driver's seat of the car and the men struggled again as the policeman tried to get him out from behind the steering wheel (82, 434). According to the witness Moore, Sgt. Sehlmeyer was "not punching him [Haber] or hitting him just trying to get him out" (733-34).

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* From a reading of plaintiff's truncated recital of the facts, one could never guess that, in fact, it was Haber who initiated the violence by his attack upon the officer.

Because of the high potential for disaster—a hallucinating man under the influence of drugs and totally out of contact with reality, who acted as though "his mind wasn't there," who was madly flooring the accelerator of a car, revving the engine up "to its full extent," in a densely crowded parking lot into which thousands of persons were about to stream as they exited from the concert—Sgt. Sehlmeyer reached into the car and attempted to turn off the engine and remove the keys (436-37, 522).

Sergeant Sehlmeyer was an experienced officer with 17 years of service (15). He did not attempt to handcuff Haber, whose hands were on the steering wheel at that time (434), because that would have magnified the danger of an uncontrolled car careening wildly at top speed through the parking lot. His first thought was to remove the key from the ignition (436-37, 52). If Haber put the car in gear it would have taken off at full speed and "he may likely have killed someone" (437, 522).

As Sgt. Sehlmeyer reached into the car with his left hand past Haber's body, the latter's hands "were flashing around" (441) and the officer felt a tugging at his holster (447, 522). At that point the officer put his hand to his gun, stopped going for the keys and again began to struggle with Haber (522).

In the course of the struggle Haber came out of the car and the officer's gun was removed from its holster and was "in both our hands" (418).* At some point the officer momentarily lost total possession of the gun and throughout the struggle both men fought for possession of it (527).

At one point while Sgt. Sehlmeyer was able to hold onto the cylinder or barrel of the gun, he hit Haber with the

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* Dr. Newman explained that a person under the influence of LSD who has very marked anxiety, such as Haber apparently experienced during his "trip", is capable of extraordinary physical feats (871-72). The anxiety or "panic reaction" also accounts for the extreme violence exhibited by Haber in his attack upon the police officer (871-72).

butt end of it but the blows "seemed to have no effect on him at all. It did not deter him from fighting" or trying to get the policeman's gun away from him (82, 524).*

While they were struggling outside the car the gun went off (83, 524), breaking the left rear door window of the police car (Pltf. Ex. 25B). At this point both men had their hands on the gun (460, 465). Officer Sehlmeyer heard a loud report but did not feel the recoil or see the flash of the weapon as it fired; he did not have his finger on the trigger (83, 464, 467, 524).

The men "continued grappling, fighting. I [Sehlmeyer] was using everything that I possessed, as far as strength, knowledge, to retain sole possession of the gun. I was unable to" (524-25, 548). Sgt. Sehlmeyer described the event and his thoughts as follows (548):

> "We continued to struggle again. About this time I recall grabbing him by the hair. We struggled towards the rear of the car, around toward the back. *All I could think of was that if he ever got the gun I was dead. I had no doubt in my mind that that was his only purpose of going for the gun.*" (Emphasis added.)

The fighting continued around the rear of the car when the gun discharged a second time (525, 548). Haber "seemed to relax and then dropped to the ground" (525). Once again, the officer felt no sensation of the shot being fired and saw no flash (548).

Dr. Minoru Araki, the medical examiner, testified, consistently with the foregoing, that Haber had powder burns on his chest and left forearm indicating that he had been shot at very close range (189, 192-93, 228, 230, 242-43). The bullet entered below the left nipple and traveled at an

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* This brief, plaintiff incorrectly asserts, without basis in the record and without page reference, that decedent "did not have his hands on the gun at anytime" (Pltf's brief, pp. 9, 21).

oblique angle of 60° from left to right and angling upwards at 10° from front to back (200-03, 229).

The officer was taken from the scene directly to a hospital (549). He was "completely spent physically", suffered from pain in his back, ribs, hip and left leg, and was cut and bruised about the face and hand (541).

POINT I

Officer Sehlmeyer's conduct in the performance of his police duties in attempting to subdue a violent drug-crazed arrestee who fought the officer for control of his service revolver and posed a real threat to the officer's life is, as a matter of law, not actionable negligence.*

It is difficult to comprehend on what basis the jury presumed to find negligence on the part of the arresting officer, given the following undisputed facts.

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* The court below did not reach this point since it found Haber to have been contributorily negligent as a matter of law. While its decision is eminently correct (as we show in Point II, *infra*), we believe that this Point logically comes first and is an equally sound basis on which to uphold the judgment. Judge Platt plainly believed that there was merit to the point for he wrote (992):

> "In addition, although there is no need to consider the matter in the light of the foregoing, there is a substantial question whether plaintiff proved any negligence, as distinguished from an assault or intentional tort, on the one hand, or justifiable conduct in an emergency on the other, on the part of the defendant Sehlmeyer. Monday-morning quarterbacking may well be permissible in football, but it has no place in the law. As the New York Court of Appeals has repeatedly said (2 N.Y.2d at p. 67):
>
> > 'When a defendant is faced with an emergency without opportunity for deliberation, thought or consideration, the ensuing accident may be within the field of nonliability for injury. Meyer v. Whisnant, 307 N.Y. 369, 121 N.E.2d 372; Prosser on Torts [2d ed.], §32, pp. 137-138.' "

Haber was under the influence of a heavy dose of a combination of hallucinogenic and psychotogenic drugs and marijuana; he was completely unable to perceive reality and acted as though he were "out of his mind"; he had assaulted two girls and tried to drag one behind some parked cars; he refused to stop when lawfully ordered to do so by the uniformed police officer and repeatedly resisted arrest; he fought with the officer, wrestling him to the ground and seized and held him from behind; he hit the officer in the mouth (594) and grabbed his blackjack (514); he commandeered the police car, gunning the engine and "flooring" the accelerator, thereby recklessly endangering countless lives if the gearshift were suddenly moved into the "drive" position.

In the face of all this the experienced arresting officer, tried valiantly to remain calm so as to prevent the potentially explosive situation from escalating. When Haber attempted to seize his weapon, as the officer sought to neutralize the danger posed by the car by reaching in to remove the ignition key, Sgt. Sehlmeyer first moved to protect the gun.

During the struggle for control of the gun, in the course of which neither man was able to achieve and maintain sole possession of the weapon, the gun discharged a first time.* Yet Haber, with the echo of a deadly shot ringing ominously in his ear, ignored this clear danger by further resisting the officer's lawful authority. Instead he struggled still more violently for the gun, flailing at the officer, so that Sgt. Sehlmeyer knew that he was "fighting for [his] life," that "if he [Haber] ever got the gun I was dead" (548).

Repeated blows to Haber's head made no impression on the crazed youth in his violent mental state (404, 514). He continued the struggle until the gun discharged a second time, mortally wounding him with a bullet through the heart.

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* Apparently it was Haber's hand that triggered this shot, since the officer neither felt the recoil nor saw the muzzle flash (548).

Section 35.15 of the New York Penal Law provides that a person may use physical force upon another "when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person," and that a person may use deadly physical force upon another under circumstances where "[h]e reasonably believes that such other person is using or about to use deadly physical force."

A *fortiori,* where the defendant is a uniformed officer of the Nassau County Police Department acting in the performance of his duties to prevent and investigate possible crimes, such use of force by him in the circumstances outlined above is specifically authorized by statute. N.Y. Penal Law §§35.15(2)(a)(ii) and 35.30(4). The statute goes on to provide that:

> "A peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he reasonably believes to have committed an offense, may use physical force when and to the extent he reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force; except that he may use deadly physical force for such purposes only when he reasonably believes that:
>
> "(a) The offense committed by such person was:
>
> "(i) a felony or an attempt to commit a felony involving the use or attempted use of physical force against a person;* or
>
> * * *

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* Here the police officer had been informed that Haber had "molested" a girl and "had attempted to pull her between some of the parked cars in the parking lot" (509, 712).

> "(c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person* from what the officer reasonably believes to be the use or imminent use of deadly physical force." N.Y. Penal Law §35.30(1).

It is difficult to conceive of a situation more appropriate for application of the statutory provisions. The statute cannot be read simultaneously to authorize the conduct of Officer Sehlmeyer in this case and yet permit him to be subjected to mammoth damages for doing what was authorized. Such an interpretation would make a mockery of the law.

If the law is to have any logic commanding of the citizenry's respect, it must, coincident with "ordinary standards of intelligence and morality," be read to allow a peace officer to perform the duty of protecting the public which his office imposes on him, without fear of devastating and punitive financial consequences each time he attempts in good faith to perform that duty. Otherwise the result would be an ineffective constabulary hamstrung by an overriding concern for the potential of personal liability in damages to every suspected felon.

> "Few public officials, Judge Hand reasoned, would perform their functions vigorously if they knew they might have to bear the burden of standing trial and defending their actions." *Bivens* v. *Six Unknown Named Agents,* 456 F.2d 1339, 1342 (2d Cir. 1972).**

It was in recognition of this very fact that the Supreme Court of the United States, in its opinion arising out of the Kent State shootings, unanimously observed that

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* Here not only was the officer's life jeopardized by Haber's struggle for control of the gun, but the lives of passers-by in the parking lot were endangered by his reckless flooring of the squad car's accelerator while the engine was running.

** See also, *e.g., People* v. *Carlton,* 115 N.Y. 618, 624 (1889).

> "[T]he public interest requires decisions and action to enforce laws for the protection of the public. . . . Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices." *Scheuer* v. *Rhodes,* 416 U.S. 232, 241-242 (1974).

The jury's verdict in the instant case went beyond all known bounds. It subjected Officer Sehlmeyer to virtually absolute liability for the death of the crazed youth who violently resisted his attempted arrest. Was it the jury's notion that some kind of calming attempt on the officer's part should first have been made? If so, they must have disregarded the evidence; for the undisputed testimony of disinterested bystanders on this subject was that, rather than go for his gun to defend himself during the initial violent attack upon him, the officer acted with unusual restraint and repeatedly attempted to calm Haber (410, 729, 731). At each stage of the escalating struggle with his prisoner, Sgt. Sehlmeyer used the minimum force possible. Nothing more could possibly have been expected or required of the officer as a matter of law as well as of fundamental fairness.

That Haber's conduct was wildly irrational imposed no greater legal duty upon the officer in dealing with him. On the contrary,

> "The character and extent of permissible force to be used by policemen in subduing a known mentally ill person are at least comparable to that allowable for the performance of any other legal duty against a normal person, such as one who resists arrest. . . .
>
> "Obviously, an officer cannot be expected to anticipate the conduct of a mentally disturbed individual. Nor is he required to have the degree of

> competence possessed by a psychiatrist nor to act with his prescience in treating with such a person. When it is considered that the City, through its police force is obliged to protect the public against the violence of a mentally ill person (Williams v. State, 308 N.Y. 548, 554) the responsibility of the officer to react forcibly to his unforeseeable and violent antics on a public street is the more urgent." *Graniela* v. *City of New York,* 27 Misc. 2d 341, 342, 211 N.Y.S.2d 114, 115.

It is significant that plaintiff's brief does not specify what acts or omissions on the officer's part could conceivably have constituted negligence. The only factor that is even remotely mentioned in this connection seems to be the fact that Officer Sehlmeyer was not able to handcuff Haber, as he had intended to do upon reaching the police car (426), before Haber broke away and leaped into the driver's seat of the idling car.

Clearly, however, as a matter of law, no negligence can be found in this fact. After the suspect, who at that point seemingly had calmed down and was docilely being led back to the police car (414, 421), suddenly broke away from the officer and got behind the wheel there was plainly no reasonable opportunity for the officer to apply his handcuffs. Most of the time before the fatal shot was discharged was taken up in the two men fighting for possession of the officer's gun. And certainly no one can justifiably find that it was negligent of the officer to struggle with Haber when the latter went for the policeman's gun rather than to reach for his handcuffs.

The only other brief interval of time saw Haber behind the wheel of the car flooring the engine and constituting a very real threat to the lives of innumerable persons who were in the parking lot or were about to enter it from the Coliseum. It is not difficult to imagine the charges of negligence that would have been made against Sergeant Sehlmeyer had a handcuffed Haber behind the wheel of

the car accidentally put it into gear causing it to speed through the parking lot running down and possibly killing one or more persons because the driver was unable to control its direction by reason of the restraint that had been placed upon him.

A person confronted with an emergency is not held to the same standard of care as the law applies to the conduct of one who has the luxury of time and safety to gauge his actions. Hence, even if by some stretch of the imagination, a Monday-morning quarterback were to come up with the notion that Officer Sehlmeyer should better have done this or that, than to have followed the course down which he was inexorably propelled by decedent's violent and menacing actions, such a conclusion would not suffice to adjudge his actions negligent.

It is a familiar rule of law that a failure to exercise the best possible judgment in coping with an emergency situation, or in making an error of judgment in an attempt to cope with an emergency situation, is not to be equated with negligence, *Rowlands* v. *Parks,* 2 N.Y.2d 64, 156 N.Y.S.2d 834; *Cohen* v. *Crementi,* 24 A.D.2d 587, 262, N.Y.S.2d 364; *Polley* v. *Polley,* 11 A.D.2d 121, 202 N.Y.S. 2d 425; *Ward* v. *F.R.A. Operating Corp.,* 265 N.Y. 303, 308, 192 N.E. 585.

In *Rowlands* v. *Parks,* 2 N.Y.2d 64, 67, 156 N.Y.S.2d 834, 836, the New York Court of Appeals stated the applicable rule as follows:

> "When a defendant is faced with an emergency without opportunity for deliberation, thought or consideration, the ensuing accident may be within the field of nonliability for injury. Meyer v. Whisnant, 307 N.Y. 369, 121 N.E.2d 372; Prosser on Torts [2d ed.], §32, pp. 137-138."

The same concept, phrased somewhat differently, was stated in *Lowery* v. *Manhattan Ry. Co.,* 99 N.Y. 158, 161 N.E. 668, as follows:

> "The law however makes allowances for mistakes and for errors of judgment which are likely to happen in such an emergency. It does not demand the same coolness and self possession which are required when there is no occasion for alarm or a loss of self control."

In its most recent pronouncement on this subject, the Court of Appeals in *Amaro* v. *City of New York,* 40 N.Y. 2d 30, 36, wrote:

> "The city also asserts that a fire alarm may not be considered an emergency for a fireman because he is trained to expect such signals. We are unable to adopt this reasoning in the case before us. The emergency doctrine has never been so limited nor should it be. The essence of the doctrine is that in sudden and unexpected circumstances where an actor is left little or no time for thought, or is reasonably so disturbed or excited that he must make a speedy decision and cannot weigh alternative courses of action, he 'cannot reasonably be held to the same conduct as one who has had full opportunity to reflect * * *' (Prosser, Law of Torts [4th ed], §33, p 169; cf *Wagner* v. *International Railway Co.,* 232 N. Y. 176). As Chief Justice Holmes once put it, 'A choice may be mistaken and yet prudent' (*Kane* v. *Worcester Consol St. Ry. Co.,* 182 Mass. 201, 202)."

Precisely the same reasoning is applicable in the case of a police officer who is called upon to act under the circumstances that confronted Officer Sehlmeyer.

If it were generally accepted as proper and necessary police procedure under the circumstances confronting Officer Sehlmeyer to reach first for handcuffs—an incredible proposition—the burden was on plaintiff at least to adduce expert testimony to that effect. This, plaintiff wholly failed to do. There is not a shred of testimony in the

record on which any finding could be based that generally accepted proper police procedure required that an attempt be made at the application of handcuffs in such emergency circumstances.

> "[W]here the party having the burden of proof is required to prove a fact which is not within the realm of competence of a lay jury, as where the plaintiff alleges that proper medical practice did not indicate a medical procedure undertaken by physicians, the plaintiff not only may, but must produce expert evidence if the allegations are to be supported." 1 Mottla, New York Evidence—Proof of Cases §295, p. 275 (1966).

Plainly this is not a matter on which the jury was competent to reach its own conclusion without a basis in expert evidence. All the evidence adduced pointed to reasonable conduct on the part of the arresting officer in the face of extreme provocation and danger. He was called on to act rapidly in the face of clear and present danger to innocent third persons as well as an imminent threat to his own life. He responded in the fashion reasonably to be expected, with all the force of law, logic and self-preservation behind him.

If some kind of preferred police procedure—of which we are unaware—is to be the standard by which to gauge his conduct, then the burden was on plaintiff to introduce evidence of it. The lay members of the jury are no experts on the subject of proper police procedure in dealing with a violent individual whose voluntary act in taking hallucinogenic drugs has precluded him from perceiving reality. This is not a matter of common knowledge or observation. *Cf. Gray* v. *Brooklyn Heights R.R.*, 175 N.Y. 448, 452-53 (1903).

POINT II

The court below correctly held, under the applicable New York law, that plaintiff's decedent was contributorily negligent as a matter of law.

The use of the term "contributory negligence" in relation to this decedent's conduct is somewhat of a misnomer. For Haber's negligence was not merely "contributory"—it was the sole, efficient cause of his death.

When lawfully arrested, Haber resisted with physical violence. He knew, or reasonably should have known, that the man arresting him was a uniformed police officer, who had twice identified himself as such. His resistance was both violative of common sense and of the law, which provides that

> "A person may not use physical force to resist an arrest, whether authorized or unauthorized, which is being effected or attempted by a peace officer when it would reasonably appear that the latter is a peace officer." N.Y. Penal Law, §35.27.

Haber's clear-cut violation of the statute constitutes both negligence *per se* on his part (*Martin* v. *Herzog*, 228 N.Y. 164, 169-170 (1920)) and contributory negligence sufficient to bar plaintiff's claim for relief.

One who voluntarily engages in a fight with another and sustains injuries therein is legally presumed to be guilty of contributory negligence so as to bar recovery by him for his injuries. Thus, in *Ruggerio* v. *Board of Educ.*, 31 A.D.2d 884, 298 N.Y.S.2d 149, 150, *aff'd*, 26 N.Y.2d 849, 309 N.Y.S.2d 596, where a 17-year-old high school student who voluntarily accepted the challenge of another student was injured, the court held:

> "Plaintiff's conduct, demonstrating a lack of reasonable regard for his own safety, was a direct cause of the incident resulting in his injury and, as such, defeats his right of recovery. . . ."

Similarly, in *Jones* v. *Kent,* 35 A.D.2d 622, 312 N.Y.S. 2d 728, an action for negligence brought by a student who had sustained injuries during a fight with another student, the court set aside plaintiff's verdict and dismissed the complaint. The Appellate Division affirmed, noting that as a matter of law plaintiff had "assumed the risk of the harm he ultimately suffered during the fight and cannot now be heard to complain".

A fortiori, where the person with whom Haber elected to engage in physical combat was a uniformed police officer, armed with a deadly weapon and acting under authority of law, his conduct in resisting arrest and trying to take the officer's gun away from him was such sheer recklessness that the court below correctly held that under the controlling New York authorities it is an absolute bar to plaintiff's recovery in this action. See, *e.g., Utica Mut. Ins. Co.* v. *Amsterdam Color Works, Inc.,* 284 App. Div. 376, 379, *aff'd,* 308 N.Y. 316 (1955), where the Court wrote:

> "[I]t is clear that where a person can choose between one of two courses to follow, one of which exposes him to danger and the other of which does not, he may be held guilty of contributory negligence if he chooses the dangerous course. In general, what constitutes knowledge and appreciation of the danger is a question of fact. Obviously, however, where the plaintiff exposes himself to some known danger there can be no question."

Nor did Haber's reckless disregard for his own safety end there. For even after the first shot was fired, which should have put him on very clear notice of the extreme gravity of the danger involved, Haber continued to fight with such vehemence as to put the officer in fear of his life (548). It was reckless in the extreme for decedent to continue the struggle for possession of the officer's gun after the first shot was fired; and the officer should not be penalized for decedent's rash behavior. Where dece-

dent's recklessness was so transparent, the case ceases to be one for the jury and becomes one that can be susceptible of only one judgment:

> "While the question of contributory negligence is ordinarily one for the jury, there are cases where the undisputed facts permit but one conclusion. This, in our view, is such a case. If one is conscious of a danger arising from the negligence of another he is not privileged to ignore it. If he continued to subject himself to it, by his own conduct he bars a recovery for any consequent injury. To express it somewhat differently, it may be said that when a plaintiff exposes himself to a known danger, he must use ordinary care to avoid being injured, and if safe courses are available, it cannot be held that ordinary care is exercised under such circumstances. 1 Warren on N.Y. Law of Negligence §9, par. 8, subd. (a); *Utica Mutual Insurance Co.* v. *Amsterdam Color Works,* 284 App. Div. 376, 379, 131 N.Y.S.2d 782, 786, aff'd 308 N.Y. 816; *Conroy* v. *Saratoga Springs Authority,* 259 App. Div. 365, 368, 19 N.Y.S.2d 538, 542, aff'd 284 N.Y. 723; *Shields* v. *Van Kelton Amusement Corp.,* 228 N.Y. 396; *Griffin* v. *State of New York,* 250 App. Div. 244, 295 N.Y.S. 304." *Townes* v. *Park Motor Sales Inc.,* 7 A.D.2d 109, 112-113, 180 N.Y.S. 2d 553, 556-557, *aff'd* 7 N.Y.2d 767, 194 N.Y.S. 2d 37 (1959).

Haber's drugged state of mind did not entitle him to a lesser standard of care for his own safety

Decedent was not entitled to any special consideration because he was under the influence of a heavy voluntarily self-administered dose of drugs on the night in question. It was as a result of his own reckless misconduct in violating the laws against possession and abuse of dangerous hallucinogenic drugs that Haber came to be in his "stoned"

and "tripping" state of mind. It was as a result of that same crazed state of mind that he had become violent, irrational and dangerous.

The law is abundantly clear that:

> "One who has disabled himself by reasons of intoxication is held to the same standard of care that is required of a sober person." 1 New York Pattern Jury Instructions—Civil, PJI 2:20, p. 144 (2d ed. 1974).

Accord, Hadley v. *B. & O. R. Co.*, 120 F.2d 993, 995 (3d Cir. 1941); *McMichael* v. *P.R.R. Co.*, 331 Pa. 584, 1 A.2d 242 (1938); *Stranahan's Administrator* v. *Fendley*, 301 Ky. 209, 215, 191 S.W.2d 391 (1945); *State* v. *Hay*, 328 S.W.2d 672, 676 (Mo. 1959); *Anslinger* v. *Martinville Inn, Inc.*, 121 N.J. Super. 525, 298 A.2d 84 (1972).

Although intoxication, of itself, may not necessarily be negligence, "Nevertheless, in a common law negligence action where the intoxication directly contributed to the injury, it is a bar to recovery," *Rodak* v. *Fury*, 31 A.D.2d 816, 817, 298 N.Y.S.2d 50, 53. *Accord, Fardette* v. *N.Y. & S. Ry. Co.*, 190 App. Div. 543, 546, 180 N.Y.Supp. 179, 181, *aff'd*, 233 N.Y. 660; *Moyer* v. *Lo Jim Cafe, Inc.*, 19 A.D.2d 523, 240 N.Y.S.2d 277, *aff'd*, 14 N.Y.2d 792, 251 N.Y.S.2d 30; *Monk* v. *Town of New Utrecht*, 104 N.Y. 552.

The same reasoning applies with even greater force where drug abuse is involved for, unlike intoxication, drug abuse is unlawful *per se* (933-34, 953).

> "Such a case does not differ essentially from that of disability resulting from the administration of a drug." ALI, Restatement 2d, Torts §283, comment 2(d), p. 19.

In either case, the policy of the law imputes the resulting injury to the misconduct of the person who voluntarily imbibes or takes the drug, and disallows recovery by him:

> "[T]he policy of the law has refused to make any allowance for the resulting disability. . . . Such intoxication does not excuse conduct which would otherwise be negligent." *Ibid.*

It has similarly been held of one suffering a disabling disease *viz.*, epilepsy, who puts himself in a potentially dangerous position behind the wheel of a car, that the culpability is his for any injuries resulting while he was in a state of uncontrollable fit. His conduct has been held to be criminally negligent where death resulted. *People* v. *Decina,* 2 N.Y.2d 133, 140, 157 N.Y.S.2d 558, 565 (1956).

Decedent's conduct in voluntarily taking heavy doses of criminally prohibited hallucinogenic drugs and then assaulting a police officer, jumping behind the wheel of a motor vehicle and gunning the engine in a crowded place, and fighting for possession of the officer's gun, was no less criminally negligent. At the very least, in a civil action sounding in negligence, it constitutes contributory negligence as a matter of law and is a complete bar to recovery. As the court below so cogently observed (989-91):

> "It is axiomatic that an individual must be held responsible for his own acts. In this case George Haber must be held responsible for 'spacing' himself 'out' and causing himself to lose control of his mind and actions, conduct and behavior. Any other result would be to condone, nay encourage, individuals in a belief that the law will not hold them responsible for their own acts.
>
> * * *
>
> "So also in the case at bar, to hold that George Haber 'may freely indulge himself' in LSD and marijuana 'in the same hope that it will not affect his' conduct, and that 'if it later develops that ensuing intoxication causes dangerous and reckless (acts) resulting in death, his unconsciousness or

involuntariness at that time would relieve him from' being held culpably negligent, would be contrary to the laws of the State of New York."

POINT III

A. Plaintiff has offered no rational theory based on the evidence which can support his contention that defendant Sehlmeyer was negligent.

B. The jury's verdict in favor of defendants on the civil rights claim (24 U.S.C. §1983) is inconsistent with the theory of an intentional shooting impliedly offered by plaintiff in support of the negligence verdicts.

A.

At the outset it is important to note that the only theory on which the jury found against defendants was *negligence,* and negligence alone. Plaintiff's brief fails to come to grips with this fact. Instead, it relies exclusively on the testimony of Donna Nelson (91) and Alan Loeffler (577) that they allegedly saw Sgt. Sehlmeyer hold decedent by the hair, take a step back, raise his weapon and fire the fatal shot (Pltf's brief, pp. 9, 21).

One need only read the signed statements of both of these witnesses, which were made immediately following the event, to realize that their trial testimony was a recent embellishment and totally unworthy of belief (Nelson, 112-13; Loeffler, 592-95).*

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* Nelson had stated: "They were both standing behind the police car. Suddenly I heard another shot. *I didn't see the shot fired* because I was calling Kevin. I then saw Linda walk up towards the policeman" (113; emphasis added).

Loeffler had stated: "They continued to fight and were now at the back of the police car. It looked like the guy was trying to grab the cop's gun. They were still fighting. Then *I heard the gun go off again* and the kid fell to the ground." (594; emphasis added). Not a word about seeing the policeman step back and fire.

At this point, however, it is not necessary even to consider their credibility. Taking their testimony at face value (which the jury plainly did not, since it found that defendants were not guilty of any intentional violation of plaintiff's civil rights), all that it could establish would be an assault, a homicide or some other form of intentional tort. The conduct attested to by those witnesses would clearly be the very opposite of negligence, and is thus an insufficient predicate for the jury's verdict in favor of plaintiff on his negligence claim.

It is fundamental that "negligence, whatever be its grade, does not include a purpose to do a wrongful act" (*Reno* v. *Bull,* 226 N.Y. 546, 551).

> "Negligence is an unintentional breach of a legal duty causing damage reasonably foreseeable, without which breach the damage would not have occurred. If the act is intentional it ceases to be a negligent act and becomes an unlawful one, falling under some other branch of the law of torts creating a liability" (*Grain* v. *Yohon,* 103 Misc. 378, 170 N.Y.Supp. 178, 181-182, aff'd 187 App. Div. 970, 176 N.Y.Supp. 901).

See also, this Court's recent decision in *Lambertson* v. *United States,* 528 F.2d 441 (1976).

The distinction between negligence and an assault was made clear in the following two recent cases: In *Jones* v. *Kent,* 35 A.D.2d 622, 312 N.Y.S.2d 728, 729, the court noted that "negligence is distinguished from assault and battery by the absence of that intent which is a necessary ingredient of the latter".

In *Murray* v. *Long Island R.R. Co.,* 35 A.D.2d 579, 313 N.Y.S.2d 610, where defendants were held liable for both negligence and assault, the court reversed and dismissed the negligence causes of action, writing:

> "The negligence award was an improper duplication of the assault-compensatory damage award. There was no evidence of negligence or negligence-induced injuries other than the assaultive acts and

> assault-induced injuries for which recovery was claimed and awarded on the assault causes of action."

The same result would have to be reached in the case at bar, where plaintiff has advanced absolutely no independent viable theory and pointed to no proof of *negligence* apart from the alleged intentional assault and fatal shooting of the deceased.

B.

The jury found for defendant on plaintiff's claim for invasion of decedent's civil rights (979-80).

In its charge with respect to the civil rights claim, the court stated the right which the deceased was allegedly wrongfully deprived of as follows (901):

> "The Constitutional right not to be deprived of life and liberty and without due process of law by shooting and killing plaintiff's said son without justification and with malice and with reckless and wanton and willful abandon".

In elaborating on this charge the court subsequently pointed out that in order for plaintiff to prevail on the civil rights claim he must establish, *inter alia*, "that the defendant Sehlmeyer knowingly and without justification and arbitrarily or with malice or with reckless, wanton and willful abandon, did shoot and kill plaintiff's son as alleged" (904).

And in restating "the issues then to be determined by the jury in this case", the court charged that the jury must decide whether defendant acted as he did toward the deceased "without justification or arbitrarily or with malice or with reckless and wanton and willful abandon" (905). It further instructed the jury that if it answered this question "No", it should return a verdict in favor of the defendant (905).

Implicit in the jury's verdict for defendant on this issue, therefore, is the finding that the officer did not

intentionally, willfully and without justification shoot the deceased. Yet, as noted above, that is the only theory advanced by plaintiff in support of the jury's verdict on the negligence causes of action. If accepted, it would plainly result in inconsistent verdicts.

In *Turner* v. *"The Cabins" Tanker, Inc.*, 327 F.Supp. 515, 519, the court wrote in language precisely applicable to this case:

> "In an occasional case, a reasonable explanation of an apparent conflict in a jury's finding may be easily spelled out. But courts should resist the temptation to stray from the field of reason into the area of speculation. The facts here defy a logical explanation; the verdict is irreconcilably inconsistent and a new trial will be granted."

See also, *Durham* v. *Metropolitan Electric Protective Assn.*, 27 A.D.2d 818, 278 N.Y.S.2d 163; *Lufrano* v. *Minot*, 52 A.D.2d 65, 382 N.Y.S.2d 507, 509.

POINT IV

In no event can the verdict be reinstated, since the court below properly exercised its discretion in granting defendants' motion for a new trial as alternative relief.

Applicable general principles

In 11 Wright & Miller, Federal Practice & Procedure, §2818, p. 118, the scope of review of an order granting a new trial is described as follows:

> "The trial court has very broad discretion and the appellate courts will defer a great deal to his exercise of this discretion. This much is well settled."

And in 6A Moore, Federal Practice ¶59.08[1] at p. 59-102, it is stated:

> ". . . the trial court's power to grant a new trial is broad and ample to the end that an unjust verdict should not stand; and, when the power is wisely used, it prevents a miscarriage of justice, and makes jury trials instruments of justice, without in the slightest invading the common law function of juries or the constitutional right of jury trial."

See also, *Delta Engineering Corp.* v. *Scott,* 322 F.2d 11, 15-16 (5th Cir. 1963), where the court wrote:

> "Great latitude is allowed to a United States District Judge to grant a new trial where in the discretion of the Judge it is needed to prevent an injustice. A clear abuse of that discretion or some extraordinary legal situation must be demonstrated to obtain relief from such action."

The motion for a new trial was properly granted as alternative relief

(a)

The court has "the duty of maintaining a reasonable consistency between the weight of the evidence and the verdict reached" (*Mann* v. *Hunt,* 283 App. Div. 140, 126 N.Y.S.2d 823, 826). That consistency is not present in this case where the verdict could not have been reached on any fair interpretation of the evidence. Accordingly, the trial court's decision to set it aside was not an abuse of discretion.

> "Juries are not infallible. They are individually and collectively, subject to the ordinary infirmities of human nature, and cases do occur where, if the court did not interpose and set aside the verdict, it would amount to a denial of justice." *People* v. *Ramos,* 33 A.D.2d 344, 346-347, 308 N.Y.S.2d 195, 197.

This is plainly such a case.

(b)

In addition to the foregoing, there is the court's belief that the interests of justice required a new trial "even if [its] judgment notwithstanding the verdict against the defendant Sehlmeyer is not sustained" (987). The court reasoned as follows (987):

> "It would be manifestly and grossly unfair to permit the verdict in a case such as this, rendered against a municipal corporate employer and its employee, to stand against an individual alone when it is discovered after the verdict that jurisdiction never existed against the corporate employer. It is in reality no different than having erroneously instructed a jury that an individual defendant was covered by an unlimited insurance policy and that they could consider that fact in arriving at a verdict."*

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* "A juror's question naturally suggests the working of the juror's mind" (*Sarconi* v. *122 West 26th St. Co.*, 241 N. Y. 340, 344). Accordingly, the court properly and realistically took cognizance of the notes sent to the court by the jury (Court's Exhibits 2 and 4; 968-71, 978).

> "(1) If we find in favor of the plaintiff on claim No. 1 [civil rights] do we then have to determine a monetary value for damages; and if so, will the Officer be held responsible for that amount?
>
> "(2) Also, on claims Nos. 2 [wrongful death] & 4 [pain and suffering], if we find in favor of the plaintiff do we have to determine a monetary value for damages? and if so, do we determine the amount which each defendant pays?
>
> Thomas Pasqua"

and

> "[Question] I hate to be redundant but we are still confused on one issue. Regarding claim Nos. 2 and 4. Can we find the following verdict, if we so wish?
>
> "In favor of the plaintiff, but against Nassau County only (and not against the Officer).
>
> Thomas Pasqua".

POINT V

A. The jury's award of $100,000 damages for the death of a young man with no proven record of earnings and with a history of drug and alcohol abuse was grossly excessive.

B. Decedent was shot through the heart. There is no evidence to support any award for conscious pain and suffering.

Although we do not contemplate the Court's having to reach the question of damages in view of the dispositive effect of the foregoing points in this brief, we would not be performing our function of fully informing the Court if we failed to point out at this juncture the grossly excessive nature of the jury's verdict. This is yet another reason why the verdict cannot be reinstated.

A. As to the wrongful death award

Decedent's total earnings from part-time employment until the date of his death amounted to only a few hundred dollars (Pltf. Ex. 5). He had no proven record of earnings on which to base an award of substantial damages. Moreover, he had a history of arrests, as early as age fourteen, for public drunkenness, as well as for possession of dangerous drugs (145-51, 794-800) and his future was uncertain at best. Thus, there is nothing that would even remotely justify the $100,000 verdict awarded by the jury as the value of the loss of this individual's financial contributions to his distributees.

Although ultimately each case must turn on its own facts insofar as the element of damages is concerned, the following guide was prescribed by the court in *Fried* v. *New York, N.H. & H. RR. Co.*, 183 App. Div. 115, 125, 170 N.Y.Supp. 697, 704, *aff'd*, 230 N.Y. 619, for use in approaching the question of excessiveness of a verdict under New York law:

> "In reaching a conclusion whether a verdict is excessive or insufficient, little aid can be gotten by consideration of any particular decided case. A long course of practice, numerous verdicts rendered year after year, orders made by trial justices approving or disapproving them, decisions on the subject by appellate courts furnish to the judicial mind some indication of the consensus of opinion of jurors and courts as to the proper relation between the character of the injury and the amount of compensation awarded."

A review of the New York cases dealing with wrongful deaths of youths with no proven earning capacity discloses a consistent pattern limiting awards in such cases to a maximum of approximately $50,000. *E.g., Gary* v. *Schwartz,* 43 A.D.2d 652, 349 N.Y.S.2d 322 (judgment for wrongful death of 16-year-old with only "pin-money" earnings reduced from $98,000 to $50,000); *Livaccari* v. *Zafonte,* 48 A.D.2d 20, 367 N.Y.S.2d 808 (judgment for wrongful death of 18-year-old girl earning $470 per month reduced from $85,000 to $50,000); *Largo* v. *Fundaro,* 51 A.D.2d 769, 380 N.Y.S.2d 58 ($55,000 awarded for wrongful death of 19-year-old college student).

In *Lawler* v. *Nucastle Motors Leasing Inc.,* 35 A.D.2d 450, 317 N.Y.S.2d 99, the court held that $55,000 was an excessive award for the wrongful death of a 23-year-old woman who was voluntarily contributing $50 per week toward plaintiff's household expenses, and remanded for new trial unless plaintiff consented to a reduction to the amount of $30,000.

In *Mehra* v. *Bentz,* 391 F.Supp. 648 (E.D.N.Y. 1975), *aff'd* 529 F.2d 1137, 1139 (2d Cir.), *cert. denied,* —— U.S. ——, 49 L.Ed.2d 375, decedent, a college graduate with some potential in his career, earned $15,000 a year and contributed $100 to $200 a month for the use of his relatives. The trial judge found the jury's award of $67,500 for wrongful death to be "incredible in light of the evi-

dence" and made the following pertinent observation (391 F.Supp. at 656):

> "There must be some rational basis to sustain this or any other verdict of a jury. In this case, none exists. An outside maximum of approximately one-half of the jury's verdict might have been justifiable on the evidence, but beyond that the verdict represents 'guesswork' and should not be sustained.
>
> "The Court is well aware of substantial verdicts being allowed to stand in cases such as Hart v. Forchelli, 445 F.2d 1018 (2d Cir.), cert. denied, 404 U.S. 940, 92 S.Ct. 284, 30 L.Ed.2d 254 (1971), and Campbell v. Westmoreland Farm, Inc. (E.D.N.Y., 1972, Judd, J.) 67-C-1, but does not believe that verdicts based on sheer speculation such as the one in the case at bar have any place in the true administration of justice."

Moreover, in none of the cited cases did the decedent possess an unenviable record of arrests for intoxication and drug abuse, such as that of Haber. Given this additional circumstance, we submit that $25,000 would have been the absolute maximum that a jury could conceivably have been justified in awarding here, assuming *arguendo* some legally sufficient basis for liability.

B. As to the award for conscious pain and suffering

The medical examiner, Dr. Araki, testified that the autopsy disclosed the path of the bullet went directly through Haber's heart (202). It entered the left ventricle, passed through the heart valve into the left atrium from which it exited into and through the lung (202). The autopsy report listed as cause of death "Massive hemorrhage due to gunshot wound of left chest involving heart and lungs, Accidental" (Pltf. Ex. 16).

From the nature of the wound it is clear that death must have been instantaneous. In any event, there is absolutely no evidence in this record to support a finding that the decedent felt or was capable of experiencing any conscious pain and suffering as a result of the gunshot wound. Accordingly, no award for conscious pain and suffering is permissible (*New Orleans & Northeastern R.R. Co.* v. *Harris,* 247 U.S. 367, 372; *Ritter* v. *State,* 74 Misc.2d 80, 344 N.Y.S.2d 257, 270; *Blunt* v. *Zinni,* 32 A.D.2d 882, 302 N.Y.S.2d 504, 506; *Bruck* v. *Meatto Trucking Corp.,* 28 A.D.2d 521, 245 N.Y.S.2d 232, 234).

In *New Orleans & Northeastern R.R. Co.* v. *Harris, supra,* the Supreme Court held:

> "Since the deceased endured no conscious suffering, he had no right of action; and possible recovery was limited to pecuniary loss sustained by the designated beneficiary."

It is fundamental that a verdict may not stand where there is absolutely no proof to support it. That, we submit, is the case with respect to the jury's award of $25,000 for Haber's alleged conscious pain and suffering.

CONCLUSION

The judgment appealed from should be affirmed.

Dated: March 14, 1977.

Respectfully submitted,

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Of Counsel.

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the within is

hereby admitted this 14th day

of March, 1977

L L & W, P.C

Attorney for